Case Management for Safety in Domestic Relations Cases

CHAPTER 10

In This Chapter...

10.1 Chapter Overview

The presence of violence has serious safety implications for domestic relations proceedings* in the family division of the circuit court:

*In this chapter, "domestic relations proceedings" refer to proceedings listed in MCR 3.201.

- Because domestic violence typically occurs in the home, the intimate partners and their children may be the only sources of information about its existence. This circumstance can impede the court's fact-finding ability regarding matters affecting the safety of the parties and their children. Although many parties to domestic relations cases disclose the presence of violence to the court soon after proceedings begin, others may not disclose it at all, or may do so only after the case is well underway. Fear, uncertainty, embarrassment, denial, and lack of financial resources may be obstacles to abused individuals as they contemplate whether to disclose information about domestic violence to a court.

- Domestic violence involves a pattern of abusive behavior perpetrated to control an intimate partner. Therefore, the separation of the parties may cause the violence to escalate rather than to cease, as the abusive party attempts to reassert the position of power in the relationship. Indeed, separation of the parties is one of several important "lethality factors" for a court to consider when assessing the danger presented by a case involving domestic violence.*

*See Section 1.4(B) on lethality factors.

- Domestic violence often involves far more than physical assault on an intimate partner. Abusive tactics can also include sexual, emotional, and/or financial abuse. Abuse can be directed at an intimate partner's friends, family members, associates, animals, or property. Children are often involved in abusive tactics, either as tools, or as victims themselves. Consistent with the foregoing tactics, abusers may manipulate court proceedings regarding support, child custody, or parenting time as vehicles for continued assertion of control.*

*See Section 1.5 on abusive tactics, and Section 1.7 on domestic abuse and children.

This chapter briefly addresses some of the case management strategies that courts can use to address the foregoing concerns. The discussion covers:

- Identifying cases where domestic violence is present.
- Limiting access to records that would reveal the whereabouts of an abused party who is in hiding to escape violence.
- Determining whether alternative dispute resolution can be safely used in a case involving allegations of domestic violence.
- Using personal protection orders appropriately in domestic relations cases.

10.2 Why Is It Important to Know Whether Domestic Violence Is Present in a Case?

No court can adequately respond to domestic violence of which it is unaware. In order to make just, workable decisions in domestic relations cases, judges and referees rely on Friend of the Court caseworkers, conciliators, and investigators to provide information and make recommendations concerning the parties and their circumstances. To carry out their duties, these court staff members must gather information about various physical and mental health issues that may be present in the family relationships before the court, including domestic violence. There are many reasons why it is important that the presence of domestic violence be identified as soon as possible after a domestic relations case is filed.

- Domestic violence, regardless of whether directed against or witnessed by a child, is a factor that the court must consider in determining the "best interests" of a child under the Child Custody Act, MCL 722.23(k).
- "The reasonable likelihood of abuse of a parent resulting from the exercise of parenting time" is a factor for the court to consider in determining the frequency, duration, and type of parenting time to be granted under MCL 722.27a(6)(d).
- Under the federal Personal Responsibility and Work Opportunity Reconciliation Act ("PRWORA") of 1996, courts must cooperate with federal and state child support agencies to safeguard against the disclosure of confidential information about persons subjected to domestic abuse. See, e.g., MCR 3.218(A)(3)(h) and 42 USC 654(26)(B)–(C).
- Identifying domestic violence early in a case allows for taking precautions to promote the safety of the parties, their children, and court personnel. For this reason, inquiry into the presence of domestic violence should also include inquiry into the presence of any "lethality factors," discussed in Section 1.4(B).
- Identifying domestic violence early in a case allows for a complete investigation about the parties' circumstances, providing a sound factual basis for judges and referees who must issue orders governing the parties' interactions as the case progresses through the court system.

Few court staff members are experts on domestic violence, just as few are experts in other health problems affecting the family, such as mental illness or substance abuse. As with other serious family health problems, intervention with domestic violence requires referral to professionals with specialized knowledge. Nonetheless, domestic violence is a critical factor to consider in domestic relations cases, and court staff will be better able to perform their duties if they have basic information about it. Many of the referral resources discussed in Sections 2.1 - 2.3 can assist courts with providing information about domestic violence to court staff.*

*For a domestic violence reference manual for Friend of the Court personnel, see Lovik, *Friend of the Court Domestic Violence Resource Book* (MJI, 2001).

10.3 Strategies for Identifying Whether Domestic Violence Is at Issue

For the reasons set forth in Section 10.2, it is important to promptly identify cases in which domestic violence is at issue. Unfortunately, the parties to such cases are often reluctant to volunteer information about the violence in their lives. Abused parties may hesitate to disclose information about domestic violence because they are concerned about the court's response to it. This concern may be fueled by an abuser's threats of physical violence or retaliatory litigation, by misinformation about court processes, or by lack of access to legal counsel. Abusers often control their partners' access to community resources; with respect to court proceedings, they may deliberately provide misinformation or prevent a partner from receiving notices sent from the court. Abusers often control the finances in a household so that their partners will not have access to the funds to pay for legal counsel in domestic relations proceedings. In one case reported by a domestic violence advocate, an abuser deliberately retained all of the domestic relations attorneys in the family's community so that his wife would not have access to them.*

*See Section 1.6(C) for more on the effects of domestic violence on a party's interaction with the court system.

The following discussion explores three strategies for overcoming barriers to communication about domestic violence:

- Courts can provide the parties with clear, consistent, ongoing information about court practices and procedures.
- Courts can promote the parties' physical safety by taking steps to minimize the opportunities for contact between them as the proceedings progress.
- Courts can obtain information about domestic violence by consistently using effective screening methods early in the case and continuing screening as the case progresses.

A. Providing Information

To overcome the fear and uncertainty that many abused individuals experience when dealing with the court system, courts can provide the parties with clear, consistent, ongoing information about court practices and procedures. Such information may make abused individuals feel safer about

disclosing domestic violence. Information is also vital to their safety; in fact, safety planning is only possible if an abused individual understands the nature and timing of the court's actions.

To effectively communicate with the parties in cases involving domestic violence, a court might take the following steps:

- Provide complete information about court proceedings, including information about the timing and duration of the proceedings.
- From the earliest stages of the case, the parties need to understand what information the court may and may not keep confidential. If a party wishes non-confidential information, such as an address, to remain confidential, it is important to provide information as to how that might be accomplished, i.e., by a court order.*
- Explain fully the factors the court will consider in making its decisions about support, child custody, or parenting time.
- Communicate to both parties that the court takes allegations of domestic violence seriously.
- Communicate to both parties that the court may order the payment of attorney fees for a willful failure to comply with an order. MCR 3.206(C).*
- Inquire about the circumstances where a party does not appear for a scheduled court proceeding.
- Provide information about community service provider agencies or pro bono legal service agencies.*
- Provide educational materials on the nature and dynamics of domestic violence. Such information may help individuals overcome their embarrassment about domestic violence or may aid those who suffer abuse but do not recognize that domestic violence is a factor in their lives. Educational materials may be made available at various locations in the courthouse, or in orientation packets or programs provided for litigants or their children.
- In providing information, consider cultural concerns, literacy, and language barriers.*
- Courts might consider using electronic media (such as the Internet) to convey information about proceedings. Appropriate warnings should be provided about the limitations on confidential access to such information.

*More about confidentiality in domestic relations proceedings is found at Section 10.4.

*See also Section 13.11 for assessing costs under the UCCJEA.

*See Sections 2.1-2.3 for information about referral resources.

*See Section 2.5 on cross-cultural communication.

It is important to understand that measures like those described above may not completely alleviate an individual's fear or uncertainty about the court's response to domestic violence. Domestic violence is a factor the court must consider in determining the best interests of the child and in setting terms for parenting time under the Child Custody Act. See MCL 722.23(k), 722.27a(6)(d). Thus, if allegations of domestic violence surface, they must be fully and fairly investigated in accordance with due process principles. There may be great tension between the abused party's need for safety and the court's duty to provide due process to both parties. In some cases, the court's efforts to create a safe environment may diminish a party's fears about safety.

In other cases, however, a party may remain uncertain about disclosing information about domestic violence because he or she fears the loss of access to children. In light of the court's duty to consider the best interests of the children, this apprehension may be justified.

Domestic violence is only one of several factors the court must consider in determining the best interests of the children.* The abused party may be concerned about the weight the court will give to other factors, including:

*More discussion of the statutory best interest factors appears in Section 12.2.

- The willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent. MCL 722.23(j). Some abused individuals fear that they will appear to be uncooperative or "unfriendly" if they raise the issue of domestic violence. This fear will be particularly significant for abused individuals who fear that the court will not believe the allegations of abuse.
- The capacity to provide for the child's physical and emotional needs. MCL 722.23(b), (c), (g). In some cases, domestic violence may have seriously impaired a party's ability to function as a parent. In other cases, the perpetrator may be a new partner who is not a parent to the children involved in a child custody or parenting time proceeding.

Courts will not change their obligation to provide due process to all parties to litigation; neither will they change the fact that custody and parenting time determinations must be made with the best interests of the children in mind. In some cases, the most helpful thing the court might do is to provide a referral to a domestic violence service agency that can provide safety planning and advocacy services. These agencies may be able to empower abused persons so that they are better able to function as parents or to extricate themselves from relationships with violent partners.

B. Minimizing Contact Between the Parties

Threats of physical violence may be a reason why abused individuals maintain secrecy in some relationships. Moreover, opportunities for continued domestic abuse may arise during court proceedings that require the presence of both parties. Courts can address these concerns by taking steps to minimize the contact between the parties:

- Honor any no-contact provisions in court orders, such as personal protection orders, probation orders, or conditional release orders issued in criminal proceedings.
- Arrange for separate waiting areas in the courthouse.
- Allow abused individuals to leave the courthouse first, and keep abusers in the courthouse until the abused individual has had the opportunity to leave without being followed.

In interstate cases, statutory provisions exist that decrease the risk of violence by permitting the taking of evidence while the parties are separated. The Uniform Child-Custody Jurisdiction and Enforcement Act ("UCCJEA"),

MCL 722.1101 et seq., contains the following procedures for gathering evidence from another state:

- In addition to other procedures available to a party, testimony of witnesses may be taken by deposition or other means allowable in this state for testimony taken in another state. MCL 722.1111(1).
- One court may request another to assist with evidence-gathering in a variety of ways: holding hearings to receive evidence; ordering a party to produce or give evidence; and having custody evaluations made regarding a child. The assisting court may then forward certified copies of hearing transcripts, evidence, or social studies prepared in compliance with the request. MCL 722.1112(1). See Section 13.10 for further discussion.

Similar provisions appear in the Uniform Interstate Family Support Act ("UIFSA"), MCL 552.1101 et seq., which provides that a petitioner's presence in Michigan is not required for the establishment, enforcement, or modification of a support order or for the rendering of a judgment determining parentage. MCL 552.1328(1). See Section 11.3(D) for more information on the evidence-gathering provisions of this Act.

C. Information-Gathering Strategies

Many commentators suggest that contested custody cases be screened as early as possible, using consistent written protocols. These commentators further recommend that screening continue as the case progresses. Based on a survey of courts nationwide, the National Center for State Courts reported the following methods for screening cases:*

- Reviewing pleadings upon case filing.
- Reviewing motion papers upon filing of motions for pretrial hearings or conferences.
- Requiring attorneys or litigants to complete and attach a screening form to the pleadings.
- Incorporating a screening component into the petition.
- Requiring all litigants who appear for a contested hearing to complete a questionnaire.
- Requiring all litigants referred to mediation, a custody evaluation, or other service to complete a screening questionnaire.
- Interviewing all litigants whose questionnaire responses indicate domestic violence between the parties. See Section 11.3(C) for some interviewing strategies.
- Searching for related proceedings involving domestic violence in other divisions or units of the court system (e.g., protection order, abuse/neglect, juvenile delinquency, or criminal proceedings).

Once the presence of domestic violence has been discovered, the court should make an ongoing assessment of the risk posed by the abusive party. A list of lethality factors appears at Section 1.4(B).

*See Keilitz, et al., *Domestic Violence & Child Custody Disputes: A Resource Handbook for Judges & Court Managers*, p 9-11, 23 (Nat'l Center for State Courts, 1997). A discussion of domestic violence screening also appears in Lovik, *Friend of the Court Domestic Violence Resource Book* (MJI, 2001), Sections 2.5-2.12. See Section 10.6 on alternative dispute resolution.

Note: Domestic violence experts have developed many screening and lethality assessment tools. The Advisory Committee for this chapter of the benchbook suggests that a court can most effectively avail itself of the resources in its community if it develops its own screening and lethality assessment criteria in cooperation with local attorneys, social workers, or other service providers with expertise in domestic violence treatment and prevention. See Section 10.6 and Appendix D for information about a Model Protocol for Domestic Violence and Child Abuse Screening in the context of domestic relations mediation.

After a court has identified a case in which domestic violence is present and assessed the potential for danger, it is better able to take appropriate steps to promote safety and fairness. These steps might include:

- Coordinating case processing with other units of the court that are handling related cases,* such as protection order, abuse/neglect, juvenile delinquency, or criminal proceedings. Communication between courts handling separate cases involving domestic violence is critical to promote safety and prevent manipulation by the parties. For a discussion of the relationship between personal protection orders and domestic relations proceedings, see Sections 7.7, 10.7, and 12.5(B).

*Keilitz, et al, *supra*, p 9.

- Collaborating with agencies outside the courts to provide appropriate services to the parties.*

*Id., p 15-17. See Sections 2.1-2.3 on referral resources.

- Using caution in ordering mediation and arbitration in cases involving allegations of domestic violence. For discussion of this issue, see Section 10.6.

- Using caution in awarding joint custody or unsupervised parenting time. The propensity for continued violence remains after divorce or separation, and violence frequently recurs during unsupervised parenting time or the exercise of joint custody.* For more discussion, see Sections 12.4 and 12.7.

*Herrell & Hofford, *Family Violence: Improving Court Practice,* 41 Juvenile & Family Court Journal 19-20 (1990).

- Requiring careful judicial review of the parties' custody and financial agreements to ensure that they are not the products of coercion or duress.

10.4 Confidentiality of Records Identifying the Whereabouts of Abused Individuals

Courts can promote safety in cases involving domestic violence by developing consistent procedures for safeguarding confidential information. Because many abused individuals seek to keep abusers from discovering their whereabouts, identifying information is of particular concern in cases involving domestic violence. Identifying information includes:

- A child's or party's residence address.
- A party's workplace or job training address.

- A party's occupation.
- A child's or party's school or place of education.
- Telephone numbers for the above entities.
- Records of name changes.

This section explores the Michigan rules governing confidentiality of identifying information in court and other records.

A. Confidentiality in Friend of the Court Records Generally

*MCR 8.119 applies to "all actions in every trial court," with exceptions not relevant here. MCR 8.119(A).

MCR 8.119(E)(1) provides that "[u]nless access to a file, a document, or information contained in a file or document is restricted by statute, court rule, or an order entered pursuant to [MCR 8.119(F)], any person may inspect pleadings and other papers in the clerk's office and may obtain copies as provided in [MCR 8.119(E)(2)–(3)]."*

MCR 8.119(F) sets forth the following procedures to obtain an order restricting access to court records:

> "(1) Except as otherwise provided by statute or court rule, a court may not enter an order that seals courts [sic] records, in whole or in part, in any action or proceeding, unless
>
> > (a) a party has filed a written motion that identifies the specific interest to be protected,
> >
> > (b) the court has made a finding of good cause, in writing or on the record, which specifies the grounds for the order, and
> >
> > (c) there is no less restrictive means to adequately and effectively protect the specific interest asserted.
>
> "(2) In determining whether good cause has been shown, the court must consider the interests of the public as well as of the parties.
>
> > (a) the interests of the parties, including, where there is an allegation of domestic violence, the safety of the alleged or potential victim of the domestic violence, and
> >
> > (b) the interest of the public."
>
> "(3) The court must provide any interested person the opportunity to be heard concerning the sealing of the records.
>
> "(4) For purposes of this rule, 'court records' includes all documents and records of any nature that are filed with the clerk in connection with the action. Nothing in this rule is intended to limit the court's authority to issue protective orders pursuant to MCR 2.302(C) [governing protective orders against discovery].

> "(5) A court may not seal a court order or opinion, including an order or opinion that disposes of a motion to seal the record.
>
> "(6) Any person may file a motion to set aside an order that disposes of a motion to seal the record, or an objection to entry of a proposed order. MCR 2.119 governs the proceedings on such a motion or objection. If the court denies a motion to set aside the order or enters the order after objection is filed, the moving or objecting person may file an application for leave to appeal in the same manner as a party to the action. See MCR 8.116(D) [regarding limitation on public access to court proceedings or records of the proceedings].
>
> "(7) Whenever the court grants a motion to seal a court record, in whole or in part, the court must forward a copy of the order to the Clerk of the Supreme Court and to the State Court Administrative Office."

In domestic relations cases, MCR 3.218 specifically governs access to Friend of the Court records. It provides that "[a] party, third-party custodian, guardian, guardian ad litem or counsel for a minor, lawyer-guardian ad litem, and an attorney of record must be given access to friend of the court records related to the case, other than confidential information." MCR 3.218(B).*

*Additionally, citizen advisory committees under the Friend of the Court Act and named government entities may access records related to their functions. See MCR 3.218(C)–(F).

Regarding professional reports, MCR 3.219 provides:

> "If there is a dispute involving custody, visitation, or change of domicile, and the court uses a community resource to assist its determination, the court must assure that copies of the written findings and recommendations of the resource are provided to the friend of the court and to the attorneys of record for the parties, or the parties if they are not represented by counsel. The attorneys for the parties, or the parties if they are not represented by counsel, may file objections to the report before a decision is made."

"Confidential information" is defined in MCR 3.218(A)(3) to mean:

> "(a) staff notes from investigations, mediation sessions, and settlement conferences;
>
> "(b) Family Independence Agency protective services reports;
>
> "(c) formal mediation records;
>
> "(d) communications from minors;
>
> "(e) friend of the court grievances filed by the opposing party and the responses;

> "(f) a party's address or any other information if release is prohibited by a court order;
>
> "(g) except as provided in MCR 3.219 [cited above, governing dissemination of a professional report], any information for which a privilege could be claimed, or that was provided by a governmental agency subject to the express written condition that it remain confidential; and
>
> "(h) all information classified as confidential by the laws and regulations of title IV, part D of the Social Security Act, 42 USC 651 *et seq*."*

*See Sections 10.5, 11.4, and 12.11 on the Social Security Act.

Under MCR 3.218(A)(3)(f), "a party's address or any other information" in Friend of the Court records can be protected from disclosure by a court order. However, this rule does not specify the procedures for obtaining such an order. If a "family violence indicator" is set in Michigan's automated child support enforcement system for an individual, that individual's address shall be confidential under MCR 3.218(A)(3)(f). AO 2003-3, 466 Mich xxiv (2002).*

*See Section 11.4 for further discussion of "family violence indicators."

MCR 3.218(H) authorizes courts to adopt administrative orders under MCR 8.112(B) that contain "reasonable regulations necessary to protect friend of the court records and to prevent excessive and unreasonable interference with the discharge of friend of the court functions."

The above authorities do not specify whether a court order issued pursuant to MCR 3.218(A)(3)(f) must be issued in accordance with the procedures set forth in MCR 8.119(F). MCR 8.119(E)(1) contemplates various sources of authority for restricting access to documents "by statute, court rule, or an order entered pursuant to [MCR 8.119(F)]." Moreover, the procedures for sealing records in MCR 8.119(F)(1) apply "[e]xcept as otherwise provided by statute or court rule." In cases where a court rule — such as MCR 3.218(A)(3)(f) — authorizes courts to order restrictions on access without providing procedures for issuing such orders, the procedures in MCR 8.119(F) seem to apply.

> **Note:** The requirement in MCR 8.119(F)(3) that the court provide "any interested person the opportunity to be heard concerning the sealing of the records" may be problematic in cases involving domestic violence. Abusers may use this "opportunity" as a tool for harassing the person seeking confidentiality. Furthermore, the motion process itself may be dangerous for an abused individual. Advance notice of a hearing on a motion may itself alert the abuser to the abused individual's whereabouts, particularly if the abused individual must appear in court for a hearing, or if the abused individual's address must appear on the motion papers. (Under MCR 2.113(C), the caption of a motion must contain the name, address, and telephone number of the pleading attorney, or, if the party has no attorney, the party's name, address, and telephone number.*) It would be helpful to permit parties to file ex parte motions to seal court records, affording an "opportunity to be heard" within a reasonable time after entry of the order under MCR 8.119(F)(6). See Section 7.5(A) on due process concerns with ex parte orders.

*Unless the court has ordered that this information can be excluded. See MCR 3.203(F).

If a person is denied access to a Friend of the Court record, that person can file a motion to gain access to the file. MCR 3.218(G) states:

> "Any person who is denied access to friend of the court records or confidential information may file a motion for an order of access with the judge assigned to the case or, if none, the chief judge."

Other authorities in addition to MCR 3.218 address the confidentiality of specific types of information of relevance in domestic relations cases. The rest of this section discusses these authorities, which govern:

- Complaints and verified statements.
- Responsive pleadings, motions, and court orders or judgments.
- Address information.
- Documents that support recommendations.
- Children's records.
- Records in interstate cases.
- Records of name changes.

For information about federal confidentiality requirements under the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, see Sections 10.5, 11.4, and 12.11.

B. Complaint and Verified Statement

Disclosure and protection of information in the complaint and verified statement in a domestic relations case is governed by MCR 3.206.

1. Information That Must Be Disclosed

MCR 3.206(A)(1) provides that a domestic relations complaint must state the complete names of all parties, the complete names and dates of birth of any minors involved in the action, and the residence information required by statute. Under this rule, the complaint does not have to contain a specific address, so that a party's state or county of residence may be sufficient. See MCL 552.9, regarding a complaint for divorce.

The court rule requires more detailed information if the action involves a minor, or if child or spousal support is requested, however. MCR 3.206(B)(1) requires the party seeking relief to attach a verified statement to the copies of papers served on the other party and provided to the Friend of the Court. This verified statement must include:

> "(a) the last known telephone number, post office address, residence address, and business address of each party;
>
> "(b) the social security number and occupation of each party;
>
> "(c) the name and address of each party's employer;
>
> "(d) the estimated weekly gross income of each party;
>
> "(e) the driver's license number and physical description of each party . . . ;
>
> "(f) any other names by which the parties are or have been known;
>
> "(g) the name, age, birth date, social security number, and residence address of each minor involved in the action, as well as of any other minor child of either party;
>
> "(h) the name and address of any person, other than the parties, who may have custody of a minor during the pendency of the action;
>
> "(i) the kind of public assistance, if any, that has been applied for or is being received by either party or on behalf of a minor, and the AFDC and recipient identification numbers . . . ;
>
> "(j) the health care coverage, if any, that is available for each minor child; the name of the policyholder; the name of the insurance company, health care organization, or health maintenance organization; and the policy, certificate, or contract number."

In cases where the support of a child is being sought pursuant to the Uniform Interstate Family Support Act ("UIFSA"), MCL 552.1318(1) states, in part:

> "[T]he petition or accompanying documents shall provide, so far as known, the obligor's and obligee's name, residential addresses, and social security numbers, and the name, sex, residential address, social security number, and date of birth of each child for whom support is sought."

However, the UIFSA provides an exception as follows:

> "Upon a finding, which may be made ex parte, that a party's or a child's health, safety, or liberty would be unreasonably put at risk by the disclosure of identifying information, or if an existing order so provides, a tribunal shall order that the party's or child's address or other identifying information not be disclosed in a pleading or other document filed in a proceeding under this act."

In cases where the custody of a minor is to be determined, additional information required by MCL 722.1209 of the Uniform Child-Custody Jurisdiction and Enforcement Act must be provided, either in the complaint or a verified statement. MCR 3.206(A)(3). MCL 722.1209 provides, in part:

> "[E]ach party, in its first pleading or in an attached sworn statement, shall give information, if reasonably ascertainable, under oath as to the child's present address, the places where the child has lived during the last 5 years, and the names and present addresses of the persons with whom the child has lived during that period."

However, MCL 722.1209(5) provides as follows:

> "If a party alleges in a sworn statement or a pleading under oath that a party's or child's health, safety, or liberty would be put at risk by the disclosure of identifying information, the court shall seal and not disclose that information to the other party or the public unless the court orders the disclosure after a hearing in which the court considers the party's or child's health, safety, and liberty and determines that the disclosure is in the interest of justice."*

*See SCAO Form MC 416.

2. Confidentiality of Information in the Verified Statement

Confidentiality of the information in the verified statement is governed by MCR 3.206(B)(2), which states:

> "The information in the verified statement is confidential, and is not to be released other than to the court, the parties, or the attorneys for the parties, except on court order. For good cause, the addresses of a party and minors may be omitted from the copy of the statement that is served on the other party."

Under the foregoing subrule, a party seeking to protect his or her identifying information from the other party must show "good cause" to do so. This "good cause" exception applies only to addresses of a party and minors. It does not protect information about a party's occupation, employment address, or insurance coverage, from which an abuser could also gain access to a victim. However, some relief regarding these items may be available under MCR 3.206(B)(3), which provides:

> "If any of the information required to be in the verified statement is omitted, the party seeking relief must explain the omission in a sworn affidavit, to be filed with the court."

While MCR 3.206(B)(3) permits a party to explain omissions in the verified statement, it does not instruct the court as to how such omissions should be handled. See Section 10.4(A) for discussion of procedures for sealed court records under MCR 8.119(F).

> **Note:** It may be helpful to ask each party on intake of a case whether there are safety concerns with disclosing identifying information to the other party. Where domestic violence is present, some courts will allow a party living in a shelter to give a post office box as an address; otherwise, a court order is needed to protect an address.

C. Confidentiality of Information Disclosed in Responsive Pleadings, Motions, and Court Judgments or Orders

The Michigan Court Rules require disclosure of parties' addresses on responsive pleadings, motion papers, and court judgments and orders awarding child or spousal support. There are no express exceptions to these requirements for cases in which disclosure of a party's address presents a danger to that party.

*See MCR 3.201(C) on the applicability of this rule in domestic relations proceedings.

- The contents of **responsive pleadings and motion papers** are governed by MCR 2.113(C).* Under this rule, the caption of a pleading or motion must contain the name, address, and telephone number of the pleading attorney, or, if the party has no attorney, the party's name, address, and telephone number. MCR 2.113(c)(1)(e)–(f).
- MCR 3.211(D)(2) states that **a judgment or order awarding child or spousal support** must "set forth the parties' residence addresses, and require parties over whom the court has obtained jurisdiction to inform the friend of the court of any subsequent change of address or employment."

The foregoing authorities contain no express provisions for requesting a protective order prohibiting disclosure to the other party. See Section 10.4(A) on protective orders that may be issued based on MCR 8.119(F).

D. Address Information

The parties to domestic relations actions and their sources of income must provide the Friend of the Court office with information about changes of address during the time such actions are pending, and after the court has entered judgments or orders in them:

- MCR 3.211(C)(2) provides that a judgment or order awarding custody of a minor must require the person awarded custody to promptly notify the Friend of the Court in writing when the minor is moved to another address.
- A child support order entered or modified by the court shall provide that each party shall keep the Friend of the Court informed of the name and address of his or her current source of income, and of the health care coverage available to him or her, including the name and contract number of the insurer. MCL 552.605a.
- A party's employer who is a source of income must promptly notify the Friend of the Court when the payer's employment is terminated or interrupted for more than 14 consecutive days, and shall provide the payer's last known address and the name and address of the payer's new employer, if known. MCL 552.614(2).

The foregoing authorities make no express provision for requesting a protective order prohibiting disclosure to the other party. See Section 10.4(A) for discussion of procedures for sealed court records under MCR 8.119(F).

Where domestic violence is present, some courts address the need for confidentiality by allowing a party living in a shelter to give a post office box as an address.

> **Note:** MCR 3.703(B)(6) governs the confidentiality of a petitioner's address in a personal protection action. This rule provides: "The petitioner may omit his or her residence address from the documents filed with the court, but must provide the court with a mailing address." The omission of a petitioner's residence address on a petition and order in a personal protection action should alert the court to potential danger in disclosing the address on documents generated in the domestic relations action. Note also that some PPOs specifically protect identifying information; if so, the domestic relations court must abide by the terms of the PPO. See Section 10.4(F) for more information.

E. Documents That Support Recommendations

MCL 552.507(4) provides for access to information gathered by Friend of the Court employees, as follows:

*These sections permit referees and Friend of the Court personnel to make reports and recommendations on custody, parenting time, or child support.

> "A copy of each report, recommendation, transcript, and any supporting documents *or a summary of supporting documents* prepared or used by the friend of the court or an employee of the office shall be made available to the attorney for each party and to each of the parties before the court takes any action on a recommendation made under [sections 5 or 7 of the Friend of the Court Act, MCL 552.505, 552.507]."* [Emphasis added.]

Although broad, the foregoing disclosure requirements permit Friend of the Court personnel to maintain the confidentiality of identifying information in appropriate cases. Under the cited statute, a *summary* of a supporting document may be provided to a party in a case rather than an original document. If Friend of the Court staff know that release of identifying information in a document will put a party in danger, they can summarize any documents that support recommendations to the court, omitting the identifying information.

F. Access to Children's Records

MCL 722.30 states that non-custodial parents must have access to information in children's records in the absence of a protective order issued by a court:

> "Notwithstanding any other provision of law, a parent shall not be denied access to records or information concerning his or her child because the parent is not the child's custodial parent, unless the parent is prohibited from having access to the records or information by a protective order. As used in this section 'records or information' includes, but is not limited to, medical, dental, and school records, day care provider's records, and notification of meetings regarding the child's education."

*See Section 6.3 for a description of a domestic relationship PPO.

A domestic relationship PPO can prohibit a person from obtaining access to identifying information in children's records.* MCL 600.2950(1)(h) provides that the court may restrain a respondent from:

> "Having access to information in records concerning a minor child of both petitioner and respondent that will inform respondent about the address or telephone number of petitioner and petitioner's minor child or about petitioner's employment address."

See also MCL 380.1137a, which prohibits a school from releasing the foregoing information protected by a PPO to a parent who is subject to a personal protection order.

Restrictions on a parent's access to children's records in a PPO can alert the domestic relations court to potential danger. If a PPO protects a child's identifying information, the court must abide by the terms of the PPO.

See Section 10.4(A) for discussion of restricted access to information in court records in cases where a PPO has not been issued and a party desires to limit a noncustodial parent's access to information regarding a child.

G. Confidentiality Requirements for Interstate Actions

Upon separation from an abuser, relocation to a new state may allow the abused party to find family support or economic opportunity in a safe location. Indeed, relocation to a new state may be necessary to escape continued violence or harassment. In cases where the abused party has relocated to a new state, the courts of that state may be called upon to enforce domestic relations orders entered in another state.

The Uniform Interstate Family Support Act ("UIFSA"), MCL 552.1101 et seq., governs interstate proceedings to determine parentage or to enforce, establish, or modify support.* MCL 552.1320 contains the following confidentiality provision that is broader than the provisions governing enforcement of support orders entered in Michigan:

*For a full list of proceedings covered by this Act, see MCL 552.1301(2).

> "Upon a finding, which may be made ex parte, that a party's or a child's health, safety, or liberty would be unreasonably put at risk by the disclosure of identifying information, or if an existing order so provides, a tribunal shall order that the party's or child's address or other identifying information not be disclosed in a pleading or other document filed in a proceeding under this act."

The Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"), MCL 722.1101 et seq., is designed to resolve jurisdictional conflicts in interstate child custody disputes. MCL 722.1209(1) contains the following disclosure requirement:

> "(1) Subject to the law of this state providing for confidentiality of procedures, addresses, and other identifying information, in a child-custody proceeding, each party, in its first pleading or in an attached sworn statement, shall give information, if reasonably ascertainable, under oath as to the child's present address, the places where the child has lived during the last 5 years, and the names and present addresses of the persons with whom the child has lived during that period. The pleading or sworn statement must state all of the following:
>
> (a) Whether the party has participated, as a party or witness or in another capacity, in another child-custody proceeding with the child and, if so, identify the court, the case number of the child-custody proceeding, and the date of the child-custody determination, if any.
>
> (b) Whether the party knows of a proceeding that could affect the current child-custody proceeding, including a proceeding

> for enforcement or a proceeding relating to domestic violence, a protective order, termination of parental rights, or adoption, and, if so, identify the court, the case number, and the nature of the proceeding.
>
> (c) The name and address of each person that the party knows who is not a party to the child-custody proceeding and who has physical custody of the child or claims rights of legal custody or physical custody of, or parenting time with, the child."

If a party's or a child's health, safety, or liberty are threatened, the UCCJEA provides an exception from disclosure of identifying information. MCL 722.1209(5) states:

> "If a party alleges in a sworn statement or a pleading under oath that a party's or child's health, safety, or liberty would be put at risk by the disclosure of identifying information, the court shall seal and not disclose that information to the other party or the public unless the court orders the disclosure after a hearing in which the court considers the party's or child's health, safety, and liberty and determines that the disclosure is in the interest of justice."

H. Name Changes

In a proceeding for a name change under MCL 711.1, the court may order for "good cause" that no publication of the proceeding take place and that the proceeding be confidential. "Good cause" includes evidence that publication or availability of a record could place the person seeking a name change or another person in physical danger, such as evidence that these persons have been the victim of stalking or an assaultive crime. MCL 711.3(1).

It is a misdemeanor for a court officer, employee, or agent to divulge, use, or publish, beyond the scope of his or her duties with the court, information from a record made confidential under MCL 711.3(3). Disclosures under a court order are permissible, however. *Id*.

If the court orders that the record of a name change is confidential and that no publication will take place pursuant to MCL 711.1, then the court must maintain the record in a sealed envelope and place it in a private file. MCR 3.613(E) states:

> "(E) Confidential Records. In cases where the court orders that records are to be confidential and that no publication is to take place, records are to be maintained in a sealed envelope marked confidential and placed in a private file. Except as otherwise ordered by the court, only the original petitioner may gain access to confidential files, and no information relating to a confidential

record, including whether the record exists, shall be accessible to the general public."

10.5 Federal Information-Sharing Requirements

In addition to the Michigan authorities described in Section 10.4, certain federal statutes contain confidentiality provisions that are of interest in domestic relations cases involving domestic violence. Federal restrictions on access to information in cases involving domestic violence appear in the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWORA"). This legislation, at 42 USC 653(a)(2)-(3), expanded the use of the Federal Parent Locator Service ("FPLS") for the following purposes:

- Establishing parentage.
- Establishing, setting the amount of, modifying, or enforcing child support obligations.
- Enforcing any federal or state law regarding the unlawful taking or restraint of a child.
- Making or enforcing a child custody or visitation determination.

The FPLS is operated by the federal Office of Child Support Enforcement in the U.S. Department of Health and Human Services. The FPLS includes a National Directory of New Hires and a Federal Case Registry of Child Support Orders. These federal databases are linked to state Directories of New Hires, and State Case Registries of Child Support Orders.

States must periodically forward data from the state databases to the corresponding databases within the FPLS. The information in the FPLS is accessible to "authorized individuals," who are defined separately in the federal statutes for purposes of custody and support matters. However, states must provide safeguards protecting the privacy rights of persons who may be in hiding from a family violence perpetrator. 42 USC 654(26)(B)–(D) requires states to:

- Prohibit the release of information on the whereabouts of a party or a child to another party against whom a protective order with respect to the former party or child has been entered, 42 USC 654(26)(B);
- Prohibit the release of information on the whereabouts of a party or a child to another person if the State has reason to believe that the release of the information to that person may result in physical or emotional harm to the party or the child, 42 USC 654(26)(C); and
- Notify the Secretary of Health and Human Services that the state has reasonable evidence of domestic violence or child abuse and the disclosure could be harmful to the custodial parent or child of the custodial parent. This notification (called a "Family Violence Indicator") is required in cases where the prohibitions in 42 USC 654(26)(B) and (C) apply. 42 USC 654(26)(D).

42 USC 653(b)(2) prohibits disclosure of FPLS information if the state has notified the Secretary of Health and Human Services that it has reasonable evidence of domestic violence or child abuse and the disclosure could be harmful to the custodial parent or child of the custodial parent. Persons seeking disclosure of information restricted by a Family Violence Indicator must seek a one-time override of the restriction from a court. The court shall determine whether disclosure or information to another person could be harmful to a party or child and, if the court determines that disclosure to another person could be harmful, the court and its agents shall not make any disclosure. See Sections 11.4 and 12.11 for more information about this process.

10.6 Alternative Dispute Resolution in Cases Involving Domestic Violence

A. General Concerns with Alternative Dispute Resolution

In Michigan, "alternative dispute resolution" ("ADR") is defined under MCR 2.410(A)(2) as:

> "any process designed to resolve a legal dispute in the place of court adjudication, and includes settlement conferences ordered under MCR 2.401; case evaluation under MCR 2.403; mediation under MCR 2.411; domestic relations mediation under MCR 3.216; and other procedures provided by local court rule or ordered on stipulation of the parties."

As the court rule indicates, ADR encompasses many different dispute resolution methods, including negotiation and settlement, mediation, and arbitration.* In distinguishing the various ADR methods, it is useful to consider the degree to which the disputants rely on assistance from a neutral third party to resolve the case:

*For general information on ADR, see 1 Michigan Family Law, ch 8 (5th ed, Inst for Continuing Legal Ed, 1998), and 79 Mich Bar J 480 et seq., (May, 2000).

- In **negotiation and settlement**, the parties typically meet face-to-face to try to reach an agreement resolving their dispute. Although there is no neutral third party to facilitate the discussion, the parties frequently engage attorneys to represent their interests. Negotiation and settlement will not result in a resolution of the parties' dispute if they are not able to reach agreement.

- In **mediation**, a neutral third party assists the parties as they work together to reach agreement.* The parties frequently have attorneys to represent them during the mediation, although this is not required. The neutral third party does not impose a solution on the parties, so that mediation will not result in a resolution of the dispute if the parties cannot agree. See MCL 552.502(*l*) ("'Domestic relations mediation' means a process by which the parties are assisted by a domestic relations mediator in voluntarily formulating an agreement to resolve a dispute concerning child custody or parenting time that arises from a domestic relations matter.") For a more detailed discussion of the types of mediation in Michigan domestic relations cases, see Lovik, *Friend of the Court Domestic Violence Resource Book* (MJI, 2001), Section 6.2.

*Some courts use "conciliation" to facilitate the parties' agreement to temporary provisions for support or access to children soon after case filing. Conciliation is similar to mediation in many respects.

- The parties to **arbitration** enter into an agreement, in which they select a neutral third party (or third-party panel) to hear their dispute and reach a decision that will be binding on them under contract principles. The parties to arbitration are typically represented by counsel, although this is not required. Because the neutral third party makes a decision for the parties, arbitration always results in a determination of the parties' rights and responsibilities. See MCL 600.5001 et seq., and MCR 3.602 on arbitration procedure.

The parties to domestic relations cases may use any of the above methods to resolve disputes. See MCR 3.216(A)(4) (parties may agree to use mediation and other settlement procedures), and MCL 600.5070-600.5075 (discussed at Section 10.6(C), governing binding arbitration in domestic relations cases).

In cases involving domestic violence and/or child abuse, concerns about safety, fairness, and abuser accountability arise for all of the foregoing alternative dispute resolution methods because they rely to some extent on the parties' ability to reach agreement. Reaching agreement is problematic in cases involving domestic violence for the following reasons:*

*More discussion of mediation appears in Lovik, *Friend of the Court Domestic Violence Resource Book* (MJI, 2001), Sections 6.3 - 6.4.

- Alternative dispute resolution methods cannot produce a fair resolution without an equal balance of power between the parties. Moreover, the parties must be empowered to express their needs and concerns without fear of reprisal or intimidation. Where domestic violence is at issue, the balance of power is so weighted toward the abuser that the possibility of coercion may be unavoidable. See Goolkasian, *Confronting Domestic Violence: A Guide for Criminal Justice Agencies,* p 61 (Nat'l Inst of Justice, 1986), cited in Lemon, *Domestic Violence and Children: Resolving Custody and Visitation Disputes,* p 131 (Family Violence Prevention Fund, 1995).
- Assault of any kind is a serious crime that should be treated as such by the court. A process in which violence is the subject of agreement implies, and allows the abuser to believe, that the abused individual is somehow responsible for the abuse. Accordingly, violence should not be a subject for negotiation or compromise. Herrell and Hofford, *Family Violence: Improving Court Practice*, 41 Juvenile and Family Court Journal 20-21 (1990).

With respect to mediation, some commentators have asserted that it can be a route to empowerment and responsibility in some situations involving domestic violence if there is adequate screening and appropriate safeguards

are in place. See Corcoran and Melamed, *From Coercion to Empowerment: Spousal Abuse and Mediation,* 7 Mediation Quarterly 303, 314 (1990). Michigan statutes and court rules governing mediation and arbitration accommodate this point of view in that they do not provide for a blanket exclusion from these dispute resolution methods for cases where domestic violence is present. Instead, most Michigan authorities acknowledge that mediation and arbitration are problematic where domestic violence is present but provide options for parties to use them in particular cases where safeguards are present. The rest of this section describes these authorities.

B. Authorities Governing Mediation in Cases Involving Domestic Violence

1. Statutory Mediation Provisions for Child Custody and Parenting Time Disputes

Friend of the Court offices are required under MCL 552.513(1) to provide mediation to the parties in domestic relations matters. This statute has limited applicability to mediation of child custody or parenting time disputes. The Friend of the Court office is not required to provide mediation for support, property division, or other issues. Mediation under the statute is strictly voluntary; the court may not require the parties to meet with a mediator.

The statute creates no express limitations on the availability of mediation for cases with special circumstances, such as cases involving domestic violence or child abuse.

2. Court Rule Mediation Provisions

MCR 3.216 is a permissive rule authorizing a court to order parties to attempt mediation. Courts that wish to exercise this authority must first submit a local ADR plan to the State Court Administrator. MCR 3.216(C)(1) contains the following features that differentiate court rule mediation from mediation under MCL 552.513(1):

- The court rule has no limitation as to subject matter — it applies to mediation of "*any* contested issue in a domestic relations case, including post-judgment matters." [Emphasis added.]
- Mediation under the court rule may be voluntary *or* court-ordered — the court may order mediation "[o]n written stipulation of the parties, on written motion of a party, or on the court's initiative."

Unlike the domestic relations mediation statute, MCR 3.216 provides for exemptions from mediation in special cases. For example, "[p]arties who are subject to a personal protection order or who are involved in a child abuse and neglect proceeding may not be referred to mediation without a hearing to determine whether mediation is appropriate." MCR 3.216(C)(3). Additionally, parties may object to mediation on the basis of the following circumstances listed in MCR 3.216(D)(3):

"(a) child abuse or neglect;

"(b) domestic abuse, unless attorneys for both parties will be present at the mediation session;

"(c) inability of one or both parties to negotiate for themselves at the mediation, unless attorneys for both parties will be present at the mediation session;

"(d) reason to believe that one or both parties' health or safety would be endangered by mediation; or

"(e) for other good cause shown."

An objecting party must file a written motion (and a notice of hearing) with the court and the attorneys of record within 14 days of receiving notice of the order assigning the case to mediation. MCR 3.216(D)(1). A hearing must be set within 14 days after the motion is filed, unless otherwise ordered by the court or by agreement of counsel to adjourn. *Id*.

3. Model Protocol for Domestic Violence and Child Abuse Screening

In collaboration with other agencies, the Michigan Domestic Violence Prevention and Treatment Board has developed a Model Court Protocol for Domestic Violence and Child Abuse Screening in Matters Referred to Domestic Relations Mediation (June 29, 2001). This Model Protocol is available from the Office of Dispute Resolution of the Michigan State Court Administrative Office. (The Protocol may also be found online at www.courts.michigan.gov/scao/dispute/odr.htm. Last visited December 16, 2003.) The Protocol succinctly states the major concerns with mediation in cases involving domestic violence, as follows:

"Mediation presumes that participants can maintain a balance of power with the help of a mediator in order to reach a mutually satisfactory resolution of a dispute. The mediation process and resulting agreement can be dangerous and unfair if the imbalance of power is great or if the imbalance is unrecognized.

"When domestic violence is present among parties in a dispute, the abuser's desire to maintain power and control over the victim is inconsistent with the method and objective of mediation. Fear of the abuser may prevent the victim from asserting needs, and the occasion of mediation may give abusers access to victims, which exposes the victim, the children, and the mediator to a risk of violence.

"Mediator neutrality may support the abuser's belief that the abuse is acceptable. The future-orientation of mediation may discourage discussion of past abuse, which in turn invalidates the victim's

concerns and excuses the abuser. This may result in agreements that are inherently unsafe.

"Mandatory referral to mediation by the court may communicate to the abuser and the abused that the violence is not serious enough to compromise the parties' ability to negotiate as relative equals. This message also may invalidate the seriousness of the abuse, dilute abuser accountability, and result in unsafe agreements.

"*When domestic violence is present, the case should be presumed inappropriate for mediation*.

"The decision whether to order, initiate or continue mediation should be made on a case-by-case basis.

"Parties should be fully and regularly informed that continuation of mediation is a voluntary process and that they may withdraw for any reason." [Emphasis added.]

The full text of the Model Court Protocol and supporting documents (including court forms) appears at Appendix D.

4. Model State Code on Domestic and Family Violence

Section 408(A) of the Model State Code on Domestic and Family Violence approved in 1994 by the Board of Trustees of the National Council of Juvenile and Family Court Judges* suggests that courts be prohibited from ordering or referring the parties to attempt mediation in the following circumstances:

*The Model is available online at www.azcadv.org/PDFs/model%20code.pdf. (Last visited on December 16, 2003.)

"1. In a proceeding concerning the custody or visitation of a child, if an order for protection is in effect, the court shall not order mediation or refer either party to mediation.

"2. In a proceeding concerning the custody or visitation of a child, if there is an allegation of domestic or family violence and an order for protection is not in effect, the court may order mediation or refer either party to mediation only if:

"(a) Mediation is requested by the victim of the alleged domestic or family violence;

"(b) Mediation is provided by a certified mediator who is trained in domestic and family violence in a specialized manner that protects the safety of the victim; and

"(c) The victim is permitted to have in attendance at mediation a supporting person of his or her choice, including but not limited to an attorney or advocate."

The commentary to this model rule notes that courts should refrain from non-mandatory referrals to mediation because "[j]udicial referrals are compelling

and often viewed by litigants as the dispute resolution method preferred by the court."

Section 407(2) of the Model Code also stresses that mediation should not occur unless the abused individual desires it. This provision requires mediators to refrain from mediating court-ordered or referral cases unless the abused individual wishes to proceed:

> "A mediator shall not engage in mediation when it appears to the mediator or when either party asserts that domestic or family violence has occurred unless:
>
> > "(a) Mediation is requested by the victim of the alleged domestic or family violence;
> >
> > "(b) Mediation is provided in a specialized manner that protects the safety of the victim by a certified mediator who is trained in domestic and family violence; and
> >
> > "(c) The victim is permitted to have in attendance at mediation a supporting person of his or her choice, including but not limited to an attorney or advocate."

C. Provisions Addressing Domestic Violence in Domestic Relations Arbitration Statutes

Effective March 28, 2001, domestic relations arbitration is subject to the provisions of MCL 600.5070 - 600.5075.* These statutes provide for arbitration as follows:

*See 2000 PA 419.

> "Parties to an action for divorce, annulment, separate maintenance, or child support, custody, or parenting time, or to a postjudgment proceeding related to such an action, may stipulate to binding arbitration by a signed agreement that specifically provides for an award with respect to 1 or more of the following issues:
>
> > "(a) Real and personal property.
> >
> > "(b) Child custody.
> >
> > "(c) Child support, subject to the restrictions and requirements in other law and court rule as provided in this act.
> >
> > "(d) Parenting time.
> >
> > "(e) Spousal support.
> >
> > "(f) Costs, expenses, and attorney fees.

"(g) Enforceability of prenuptial and postnuptial agreements.

"(h) Allocation of the parties' responsibility for debt as between the parties.

"(i) Other contested domestic relations matters." MCL 600.5071.

In MCL 600.5072(1)(c), the Legislature has acknowledged that ***"arbitration is not recommended for cases involving domestic violence."*** [Emphasis added.]* This acknowledgment appears in a provision prohibiting a court from ordering a party to participate in arbitration unless each party acknowledges in writing or on the record that he or she has been informed in plain language of the following:

*The domestic relations arbitration statutes contain no definition of "domestic violence." See Section 1.2 for definitions that apply in other contexts.

"(a) Arbitration is voluntary.

"(b) Arbitration is binding and the right of appeal is limited.

"(c) Arbitration is not recommended for cases involving domestic violence.

"(d) Arbitration may not be appropriate in all cases.

"(e) The arbitrator's powers and duties are delineated in a written arbitration agreement that all parties must sign before arbitration commences.

"(f) During arbitration, the arbitrator has the power to decide each issue assigned to arbitration under the arbitration agreement. The court will, however, enforce the arbitrator's decisions on those issues.

"(g) The party may consult with an attorney before entering into the arbitration process or may choose to be represented by an attorney throughout the entire process.

"(h) If the party cannot afford an attorney, the party may wish to seek free legal services, which may or may not be available.

"(i) A party to arbitration will be responsible, either solely or jointly with other parties, to pay for the cost of the arbitration, including fees for the arbitrator's services. In comparison, a party does not pay for the court to hear and decide an issue, except for payment of filing and other court fees prescribed by statute or court rule for which the party is responsible regardless of the use of arbitration." [Emphasis added.]

If either party is subject to a PPO involving domestic violence, or if there are allegations of domestic violence or child abuse in the pending domestic relations matter, the court is prohibited from referring the case to arbitration

unless each party waives this exclusion. The exclusion cannot be waived unless the party is represented by an attorney throughout the action (including the arbitration process). The party must also be informed on the record concerning the arbitration process, the suspension of the formal rules of evidence, and the binding nature of arbitration. MCL 600.5072(2). If a party decides to waive the exclusion from arbitration in accordance with the foregoing requirements, "the court and the party's attorney shall ensure that the party's waiver is informed and voluntary. If the court finds a party's waiver is informed and voluntary, the court shall place those findings and the waiver on the record." MCL 600.5072(3).

A child abuse or neglect matter is specifically excluded from arbitration. MCL 600.5072(4).

An arbitrator must be an attorney in good standing with the State Bar of Michigan who has practiced for not less than five years prior to the appointment as an arbitrator and demonstrated an expertise in the area of domestic relations law. Arbitrators must also have received training in the dynamics of domestic violence and in handling domestic relations matters that have a history of domestic violence. MCL 600.5073(2).

10.7 Comparing Personal Protection Orders with Domestic Relations Orders Under MCR 3.207

The personal protection order is as entangled with domestic relations proceedings in Michigan as domestic violence is with the breakdown of many marriage relationships. MCR 3.207(A) states that the court "may issue ex parte and temporary orders with regard to any matter within its jurisdiction *and* may issue protective orders against domestic violence as provided in subchapter 3.700 [governing PPOs]." [Emphasis added.] See also MCL 552.14(1), which provides that on the motion of a party, the court may issue a PPO before or at the time of a divorce judgment, order for separate maintenance, or decree of annulment, regardless of whether a PPO was previously entered during the pendency of the action.*

*Under the provisions cited, issuance of a domestic relations order, divorce judgment, order for separate maintenance, or decree of annulment should not preclude the court from also issuing a PPO. See Section 7.4(A).

This section compares the domestic relationship PPO under MCL 600.2950 with the domestic relations order under MCR 3.207 to assist the court in determining which type of order is most appropriate in a particular case. In general, a PPO is intended for situations where physical assault or other injury is anticipated due to one party's acts of domestic abuse. Domestic relations orders under MCR 3.207 are best suited for non-violent situations in which the parties require court assistance to regulate child custody, support, or property matters pending entry of the final judgment in the case.

> **Note:** A PPO takes precedence over any existing custody or parenting time order until the PPO expires, or until the court with jurisdiction over the custody or parenting time order modifies that order to accommodate the conditions of the PPO. MCR

3.706(C)(3). See Sections 7.7 and 12.5(B) for more discussion of PPOs and access to children.

A. Persons Subject to the Court's Order

Ex parte or temporary orders issued under MCR 3.207 and domestic relationship personal protection orders issued under MCL 600.2950 apply to overlapping categories of persons. Ex parte or temporary orders are appropriately used in the domestic relations proceedings set forth in MCR 3.201(A):

- Actions for divorce, separate maintenance, or annulment of marriage;
- Actions for affirmation of marriage;
- Paternity actions;
- Actions for family support under MCL 552.451 et seq.;
- Actions regarding the custody of minors under MCL 722.21 et seq.;
- Actions regarding parenting time with minors under MCL 722.27b; and
- Proceedings that are ancillary or subsequent to the foregoing actions, relating to the custody of minors, parenting time with minors, and support of minors and spouses or former spouses.

The parties to the above domestic relations actions will generally overlap with the parties to PPO actions because they typically fall into one of the following categories of persons who may be restrained under the domestic relationship PPO statute, MCL 600.2950:

- The petitioner's spouse or former spouse;
- A person with whom the petitioner has had a child in common;
- A person who resides *or* who has resided in the same household as the petitioner; or
- A person with whom the petitioner has *or* has had a dating relationship.

Note: Because a domestic relationship PPO is usually appropriate in cases where the PPO is sought concurrently with a domestic relations proceeding, this section will not refer to non-domestic stalking PPOs under MCL 600.2950a. See Sections 6.3(A) and 6.4(A) for a comparison of these two types of PPOs.

B. Conduct Subject to Regulation

MCR 3.207(A) authorizes the court to issue "ex parte and temporary orders with regard to any matter within its jurisdiction" and "protective orders against domestic violence as provided in subchapter 3.700 [governing PPOs]." Although no Michigan appellate court has construed this language, it appears to direct the court to address "domestic violence" by way of a PPO —

typically under MCL 600.2950 — and other domestic relations issues by way of an order under MCR 3.207.

In deciding whether a case involves domestic violence that should be restrained by a PPO, it is helpful to keep two ideas in mind. First, "domestic violence" is generally more than an isolated instance of physical abuse within an intimate relationship — it involves a *pattern* of behaviors perpetrated with the intent and effect of exercising control over an intimate partner. This pattern may involve physical, sexual, emotional, and/or financial abuse. It may also include non-criminal acts, which are nonetheless dangerous if committed in the context of other behavior that leads to a violent crime.* Second, the purpose of a PPO is to prevent domestic violence crimes. See *United States v Dixon*, 509 US 688, 694 (1993), in which the U.S. Supreme Court characterized civil protection order proceedings as "an historically anomalous use of the contempt power" to restrain criminal behavior.

*See Sections 1.2-1.5 on the nature of domestic violence, and Section 1.4(B) on assessing lethality in cases involving domestic violence.

The statutes governing domestic relations orders and domestic relationship PPOs illustrate the type of conduct that is regulated under each type of order. MCL 552.15(1) provides as follows:

> "After the filing of a complaint in an action to annul a marriage or for a divorce or separate maintenance, on the motion of either party or the friend of the court, or on the court's own motion, the court may enter such orders concerning the care, custody, and support of the minor children of the parties during the pendency of the action as prescribed in . . . MCL 552.605, and as the court considers proper and necessary. Subject to . . . MCL 552.605b, the court may also order support as provided in this subsection for the parties' children who are not minor children. "

A domestic relationship PPO under MCL 600.2950 is designed to restrain behavior that imposes upon or interferes with personal liberty or that causes a reasonable apprehension of violence. Under MCL 600.2950(1)(a)-(j), the court may enjoin one or more of the following acts:

- Entering onto premises.
- Assaulting, attacking, beating, molesting, or wounding a named person.
- Threatening to kill or physically injure a named person.
- Removing minor children from the person having legal custody of them, except as otherwise authorized by a custody or parenting time order.
- Interfering with the petitioner's efforts to remove the petitioner's children or personal property from premises solely owned or leased by the respondent.
- Purchasing or possessing a firearm.
- Interfering with the petitioner at the petitioner's place of employment or education or engaging in conduct that impairs the petitioner's employment or educational relationships or environment.

- Having access to information in records concerning a minor child of both petitioner and respondent that will inform the respondent about the address and telephone number of the petitioner and the petitioner's minor child or about the petitioner's employment address.
- Stalking, as defined in the criminal stalking statutes.*
- Doing any other specific act that imposes upon or interferes with personal liberty or that causes a reasonable apprehension of violence.

*See Sections 3.7-3.12 on stalking.

C. Issuance of Order

Because PPOs are intended to protect petitioners from violent behavior, the procedures for issuing them differ significantly from the procedures for issuing domestic relations orders under MCR 3.207. These differences are as follows:

- To protect petitioners who have fled from their places of residence to escape violence, a PPO may be issued in any county in Michigan regardless of the parties' residency. MCR 3.703(E)(1).* Orders issued under MCR 3.207 are subject to the residency restrictions of the underlying domestic relations action. See, e.g., MCL 552.9, regarding divorce actions.
- There is no filing fee for a PPO petition, and no summons is issued. Moreover, since PPO petitions are filed as independent actions, no motion fees are allowed. See MCR 3.703(A), discussed in Section 6.5(B). Motions in domestic relations actions are subject to a $20.00 motion fee. MCL 600.2529(1)(e). See also MCR 2.119(G). Motion fees in domestic relations actions can be waived under MCR 2.002.
- Under MCL 600.2950b, standardized PPO forms are available for use by pro se parties. Upon request, the court may provide assistance (but not legal assistance) to a party in completing the forms and may instruct the party regarding proper service of the order. There is no similar provision for assistance to pro se parties applicable to proceedings under MCR 3.207.
- A PPO is filed as a separate action from any accompanying domestic relations action, so that it will not be inadvertently terminated upon conclusion of the domestic relations action. MCR 3.703(A). Temporary domestic relations orders are vacated by entry of final judgment unless specifically continued or preserved. MCR 3.207(C)(6).
- The court must rule on a petition for an ex parte PPO within 24 hours of its filing. MCR 3.705(A)(1). There is no such restriction for orders issued under MCR 3.207.
- An ex parte PPO must be issued for a period of no less than 182 days. The restrained party may move to modify or rescind the PPO and request a hearing within 14 days of service or actual notice, unless good cause is shown for filing the motion after the 14 days have elapsed. MCL 600.2950(13) - (14). An ex parte order issued under MCR 3.207(B)(4) "remains in effect until modified or superseded by a temporary or final order." The adverse party has 14 days from service of the order to file written objections; if no objection is filed, the ex parte order automatically becomes a temporary order. MCR 3.207(B)(6).

*Venue is more restricted if the respondent is under age 18. See MCR 3.703(E)(2), discussed at Section 6.5(B)(1).

- An ex parte PPO is effective when signed by a judge and is immediately enforceable, without written or oral notice to the restrained party. MCL 600.2950(11)(b), (12). An order issued under MCR 3.207(B)(3) is "effective upon entry and enforceable upon service."

D. Enforcement Proceedings

A comparison of the enforcement mechanisms for PPOs and domestic relations orders under MCR 3.207 further reveals the differences between these two types of proceedings. Violation of a PPO subjects the adult offender to warrantless arrest and criminal or civil contempt sanctions. Offenders age 17 and older found guilty of criminal contempt shall be imprisoned for not more than 93 days and may be fined not more than $500.00. MCL 600.2950(23).* These penalties reflect the Legislature's recognition that domestic violence is criminal behavior. On the other hand, the enforcement mechanisms for domestic relations orders under MCR 3.207 reflect the essentially civil nature of these proceedings. Although arrest and contempt proceedings are available to enforce a domestic relations order, the governing statutes also provide alternative, less coercive methods of enforcement, which allow for more flexibility in resolving disputes arising from these orders.

*Offenders under age 17 are subject to the dispositional alternatives under the Juvenile Code. See Section 8.11(I)(2)-(3).

The different natures of the PPO and the domestic relations order are illustrated by the following enforcement features:

- A PPO is entered into the LEIN system. MCL 600.2950(17). There is no provision for LEIN entry of domestic relations orders issued under MCR 3.207.
- A party who is in violation of a PPO is subject to warrantless arrest pursuant to MCL 764.15b. In cases where the party in violation has not received notice of the PPO, MCL 600.2950(22) authorizes law enforcement officers to give the party verbal notice and an opportunity to comply with the PPO — failure to immediately comply is grounds for immediate custodial arrest. There is no provision authorizing warrantless arrest for violation of an order issued under MCR 3.207. However, the Friend of the Court may petition for an order of arrest at any time if immediate action is necessary to enforce a domestic relations order or judgment concerning support, parenting time, or custody. MCR 3.208(B)(6).
- Violation of a PPO is punishable by criminal or civil contempt sanctions. MCL 600.2950(23), (26). The prosecuting attorney is responsible to prosecute criminal contempt proceedings against the respondent, whether brought after warrantless arrest, or by a motion to show cause filed by the petitioner. MCL 764.15b(7). For orders issued under MCR 3.207, the Friend of the Court is responsible to initiate enforcement proceedings. MCR 3.208(B). The Friend of the Court may petition for an order to show cause why a party should not be held in contempt, but contempt sanctions are not the only remedy. See, e.g., MCL 552.511, which sets forth alternative remedies for custody or parenting time violations, and MCL 552.607, regarding arrearages on orders of support.

If a dispute arises over a PPO issued in the context of a domestic relations case, some commentators suggest that the court handle resolution of the dispute with the criminal nature of the PPO in mind. Typically, domestic relations proceedings of a civil nature call for negotiated settlements of private disputes involving property distribution or child custody. To the extent that PPO proceedings address criminal conduct, however, they should not be a subject for negotiation or settlement between the victim and the perpetrator. Finn & Colson, *Civil Protection Orders: Legislation, Current Court Practice, and Enforcement*, p 4 (National Institute of Justice, 1990). See also Section 10.6 on the use of mediation and arbitration in cases involving domestic violence.